

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 05-243
Table of Allotments)	RM - 11363
FM Broadcast Stations)	RM-11364
(Meeteetse, Wyoming))	RM - 11365

RECEIVED - FCC

MAY 21 2007

To: Office of the Secretary
Attn: Assistant Chief, Audio Division
Media Bureau

Federal Communications Commission
~~Bureau~~ / Office *Secretary*

REPLY TO
"REQUEST FOR EXERCISE OF COMMISSION'S STAFF DISCRETION IN
MB DOCKET NO. 05-243"

Millcreek Broadcasting, LLC; Simmons SLC-LS, LLC; 3 Point Media - Coalville, LLC; and College Creek Broadcasting LLC (together, the "Joint Parties"), submit their Reply Comments in the above captioned proceeding on the deadline for responses to the *Order to Show Cause* ("OSC"), released April 20, 2007 (DA 07-1792) directed to Citicasters Licenses, L.P ("Citicasters"), licensee of Stations KXRV(FM), Centerville, Utah and KOSY-FM, Spanish Fork, Utah. The OSC requested Citicasters to demonstrate why it cannot change its channels for both stations as requested in the Joint Parties Counterproposal. In support hereof, the Joint Parties state as follows:

1. On April 17, 2007, Citicasters submitted the above referenced pleading asking the Commission to dismiss the Joint Parties Counterproposal (as well as two other separate Counterproposals filed in this proceeding) due to the size and complexity of the Counterproposal. Citicasters cites the *Notice of Proposed Rule Making* and *Report and Order* in

No. of Copies rec'd 0 + 4
List ABCDE

MB Docket No. 05-210' in support of its position. Citicasters complains that the 15 day reply period for responses to the Counterproposal was not enough time to review and prepare a reply and that the Commission's ECFS system did not contain the entire document. Citicasters suggests that since there are several alternate channels for Meeteetse, the three Counterproposals, including the Joint Parties' Counterproposal can now be bifurcated and should be subjected to the Commission's new filing procedures (MB Docket No. 05-210). Finally, Citicasters argues that one of the other Counterproposals should be denied on the merits due to the alleged creation of unserved and underserved areas.

2. Citicasters' pleading is disingenuous, self-serving and misleading. It complains that it did not have sufficient time to review the Counterproposal and could not retrieve a complete copy in the Commission's ECFS system. However, Citicasters is well aware that the Joint Parties served it with a copy of the Counterproposal when it was filed on Sept. 19, 2005, approximately 20 months ago. Representatives of the Joint Parties and Citicasters had discussions in connection with these proposed channel changes in an effort to obtain Citicasters consent to the changes. A simple phone call to undersigned counsel could have resolved this issue by allowing counsel to provide Citicasters with a replacement copy. Obviously, Citicasters would have reported to the Commission that the Joint Parties failed to serve it with a copy of the Counterproposal if that were the case. It is apparent that Citicasters missed the 15 day deadline for filing a Reply on the date set by the Public Notice, released March 28, 2007, Report No. 2809, which was April 12, 2007. The complaints by Citicasters about the ECFS system and that 15 days was insufficient time are transparent *post hoc* justifications for missing the April 12, 2007 reply date.

¹ *Revisions of Procedures governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 20 FCC Rcd 11169 (2005).

3. Citicasters recognizes that the Commission decided not to adopt the proposal to limit the number of stations that could be involved in a rule making proposal in the ***Report and Order*** in MB Docket No. 05-210.² The Commission specifically stated that it would not return any of the pending community of license change proposals and would not require that they be resubmitted under the new rules.³ While the Commission did state that it would, in extreme cases, return such proposals, the Joint Parties believe that the Commission was speaking of new filings rather than 'pending proposals in view of the statement referenced in paragraph 14. Nevertheless, the Joint Parties submit that this is not an extreme case. The Commission staff has already processed this proposal and if the staff were inclined to return it, there have been several opportunities for it to have already done so. It would be extremely unfair to the entities which have auction channels which are about to expire to have suffered the delay of having waited 20 months to reach this stage of the proceeding and then be told that their proposed improvements cannot be accommodated and that they must attempt to file for some lesser improvement within the short amount of time left until the permits' expiration dates. Furthermore, the Counterproposal does not contain any complex issues and it is simply a matter of checking to see that each part of the proposal meets the spacing requirements and city grade coverage. The Joint Parties have shown clearly that each part of the proposal is in compliance. Such review is no more difficult than reviewing each of the proposals separately.

4. **As** a final point, the Joint Parties Counterproposal will provide substantial public interest benefits. If the Commission were to return the proposal, it would elevate Commission resources over the public interest. Such an effort would set a disturbing precedent which could not be limited to rule making proposals but logically could extend to a particular transaction,

Id.

³ See para. 14, supra.

enforcement or litigation proceeding which is too resource intensive. How could the Commission tell the public that its primary *raison d'etre*, to allocate spectrum for the public's use, can be avoided any time it determines that a proposal has too many stations involved? Yet when it receives a complicated transaction, for example, the Commission must devote as much of **its** resources as necessary to process the applications.

5. Citicasters is well aware that the Commission's efforts to limit the number of stations that can be involved in a proposal is under reconsideration in MB Docket 05-210 and it is in that forum where it should offer its reasons to support a limit which, of course, would apply equally to Citicasters and any of its affiliated entities if one of its improvement proposals required more than four stations for its implementation. In that regard, the Commission should be aware that since the adoption of its new procedures, there have not been any proposals filed which involve more than four stations, as far as can be determined. In addition, the record in MB Docket 05-210 reveals that in the five years prior to the comment date in that proceeding, an average of only 3.3% of all proposals or an average of three per year involved more than four contingent proposals. The concern that Citicasters offers for the amount of work that the Joint Parties have placed on the Commission staff is unfounded, self serving and anti-competitive.

6. Citicasters would have the Commission dismiss the Joint Parties Counterproposal because there are several alternate channels available to Meeteetse that eliminate the mutual exclusivity of the Joint Parties' filing. However, it was the Joint Parties that performed the studies and offered the alternate channels in an effort to allow the Commission to provide a first local service to this community. The Joint Parties should not be punished for submitting these alternative channels for Commission consideration when it could have merely stated 'the proposals are in conflict and argued that its own proposal should have been preferred over the

conflicting Meeteetse channel. The Joint Parties did the right thing by asking its engineering consultant to find an alternate channel for Meeteetse. Such an effort is commonly undertaken and Citicasters has not cited any case where the Commission has dismissed a proposal that is filed in conflict with a Notice of Proposed Rule Making and an alternate channel is available to resolve the conflict. A dismissal on such grounds would be extraordinary.

7. Finally, Citicasters indicates that it has reviewed one of the other Counterproposals filed in this proceeding. (In order to respond, 3 Point Media – Delta, LLC, joins with the Joint Parties for the purpose of addressing this portion of Citicasters’ pleading.) Curiously, Citicasters is not affected by the separate Counterproposal that it objects to!! The objection is based on Citicasters’ engineer’s decision to ignore a new allotment proposal for Marbleton, WY that will cover unserved area created when unbuilt new Station KFMR(FM) is relocated to Ballard, UT.⁴ By ignoring this proposed new channel, Citicasters purports to have found that there is an unserved area containing 121 persons and an underserved area containing 739 persons.⁵ However the Commission has not held that the removal of an unbuilt permit presents the same loss of service concerns as the removal of an existing service. As a result, the Commission has consistently permitted such unbuilt stations to change city of license even though the former city would be left without local service.⁶ In so doing, the Commission has recognized that a new allotment will provide the potential for service just as an unbuilt permit

⁴ It is unclear how Citicasters decided to ignore vacant allotments in its study but not unbuilt permits which also represent potential service.

⁵ Even if the new allotment at Marbleton is ignored, the Commission has held in numerous cases that this amount of unserved area is *de minimis*. See *Eldorado, Mason, Mertzon and Fort Stockton, Texas*, DA 07-61 (2007) (the provision of a first aural service to 124 persons was *de minimis*); *Freer, Hebbroville, and Orange Grove, Texas*, 19 FCC Rcd 4742 (2004) (the provision of a first aural service to 178 persons was *de minimis*); *Sparta and Buckhead, Georgia*, 16 FCC Rcd 2169 (2001) (the creation of underserved area consisting of 124 persons was *de minimis*); *Seabrook, Texas, et al.*, 10 FCC Rcd 9360 (1995) (the provision of a second aural service to 455 persons was *de minimis*).

⁶ See *Linden, Texas, et al.*, 16 FCC Rcd 10853, 10854 (2001); *Grand Isle and Empire, Louisiana*, 15 FCC Rcd 9162, 9163 (2000); *Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664, 7665 (1997).

merely provides the same potential for that service. Thus the proposed replacement of the Marbleton channel with another channel of the same class should be permitted by the Commission.⁷

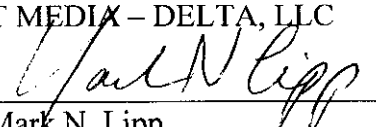
8. The Joint Parties reiterate that they will reimburse Citicasters for its reasonable expenses in changing channels in accordance with *Circleville, Ohio*, 8 FCC 2d 149 (1967).

WHEREFORE, for the foregoing reasons, the Commission should expeditiously grant the Joint Parties Counterproposal to provide first local service, new service to unserved areas, in the case of the Counterproposal with 3 Point Media – Delta, LLC, and substantial increases in service to this area.

Respectfully submitted,

MILLCREEK BROADCASTING, LLC
SIMMONS SLC-LS, LLC
3 POINT MEDIA – COALVILLE, LLC
COLLEGE CREEK BROADCASTING, LLC
3 POINT MEDIA – DELTA, LLC

By:


Mark N. Lipp
Scott Woodworth
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
202-719-7503

Their Counsel

May 21, 2007

⁷ Greenup, Kentucky and Athens, Ohio, 4 FCC Rcd 3843 (1989).

ENGINEERING STATEMENT
MB Docket 05-243

May 21, 2007

Millcreek Broadcasting, LLC
Simmons SLC – LS, LLC
3 Point Media – Coalville, LLC
3 Point Media – Delta, LLC
College Creek Media, LLC

Introduction:

The instant Engineering Statement is being submitted on behalf of Millcreek Broadcasting, LLC, Simmons SLC – LS, LLC, 3 Point Media – Coalville, LLC, 3 Point Media – Delta, LLC, and College Creek Media, LLC (collectively, the “Joint Parties”) to refute certain statements made by Citicasters Licenses, L.P. (“Citicasters”), licensee of stations KOSY-FM Spanish Fork, UT, and KXRV(FM) Centerville, UT, in its *Request for Exercise of Commission Staff Discretion in MB Docket No. 05-243* (“Request”).

In its Request, Citicasters’ consulting engineer, Mr. Louis R. du Treil, Jr., states that the Joint Parties’ Counterproposal offered in MB Docket 05-243 “would result in a significant net increase in nighttime aural unserved and underserved population.” In backing up this claim, Mr. du Treil points to the Joint Parties’ proposed deletion of Channel 239C1 from Marbleton, Wyoming, being made in order to accommodate the subsequent reallocation of Channel 239C3 to Ballard, Utah, for use by KFMR(FM). In describing his study methodology, Mr. du Treil states, “all licensed and construction permit FM broadcast stations that would provide predicted 60 dBu service in the region of the Counterproposal were considered,” and, “in keeping with FCC practice for evaluation of other aural services, vacant FM allotments were not considered, including those in the Counterproposal.”

Citicasters' Methodology is Flawed

In considering a reallocation proposal under *Community of License*,¹ the Commission compares the existing allotment against the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments under the guidelines set forth in *Revision of FM Assignment Policies and Procedures*.² Consistent with *Greenup, Kentucky, and Athens, Ohio*,³ vacant allotments are considered in making this comparison unless, as further dictated in *Community of License*, the allotment proposed for deletion is an existing service.

In *Community of License*,⁴ the Commission specifically stated “The public has a legitimate expectation that **existing** (emphasis added) service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both.” KFMR(FM) has not yet commenced operations at Marbleton, Wyoming. As such, the population of Marbleton and its environs do not have any expectation of continued service from KFMR(FM).

The Commission has held that the removal of an unbuilt facility does not present the same concerns as the removal of an operating station.⁵ Since the deletion of Channel 239C1 from Marbleton, Wyoming, represents the deletion of “potential” service as opposed to the deletion of “existing” service, the Joint Parties’ Counterproposal, which includes the proposed allotment of

¹ See *Modification of FM and Television Authorizations to Specify a New Community of License* (“*Community of License*”), 4 FCC Rcd 4870 (1989); *recon. granted in part*, 5 FCC Rcd 7094 (1990).

² *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

³ *Greenup, Kentucky, and Athens, Ohio*, Memorandum Opinion and Order, 6 FCC Rcd 1493 (1991)

⁴ *Community of License*, Memorandum Opinion and Order, 5 FCC Rcd at 7097

⁵ *Linden, TX, et al.*, 16 FCC Rcd 10853 (2002); *Chatom and Grove Hill, AL*, 12 FCC Rcd 7664 (1997)

Channel 257C1 at Marbleton, Wyoming, is acceptable for replacement of potential local service and must also be considered when identifying remaining services **around** Marbleton. Thus, Citicasters' methodology in determining remaining services in its Request is flawed since it did not include the proposed vacant allotment of Channel 257C1 at Marbleton, Wyoming.

Marbleton, WY, Remaining Services

Exhibit I is an updated remaining services map for Marbleton, Wyoming, and its environs.⁶ The contours of the following services either completely or partially cover the loss area that will be created upon the deletion of Channel 239C1 at Marbleton, Wyoming:

<u>Call Sign</u>	<u>Channel</u>	<u>Community of License</u>
RADD	257C1	Marbleton, WY
KRSV-FM	254A	Afton, WY
KUWA(FM)	217A	Afton, WY
KZJH(FM)	237C	Jackson, WY
KJAX(FM)	227C	Jackson, WY
KPIN(FM)	266C3	Pinedale, WY
KUWX(FM)	215A	Pinedale, WY
KFRZ(FM)	221C	Green River, WY

⁶ Full-time AM, as well as FM commercial and noncommercial stations were considered as remaining services in geographical proximity to Marbleton, WY. In determining reception service proved by an FM station, the area circumscribed by each FM station's 1.0 mV/m signal contour, assuming maximum facilities for the class of station, except for Class C, were considered assuming uniform terrain. For Class C stations, the minimum or existing Class C facilities, whichever is greater, was used. For an FM station authorized under Section 73.215, in accordance with current procedures used by the Commission's allocations engineers, the station was examined as if fully spaced under Section 73.207 without regard to any height limitation, power limitation, or directional antenna used to provide contour protection. The area of reception service for full-time AM stations is defined according to whether it is a clear channel Class AM station or another class of full-time AM station. For a clear channel Class A station, the reception area is defined by that station's 0.5 mV/m groundwave contour, based on its licensed facilities. For all other classes of full-time AM stations, reception service is defined as that service received within the station's nighttime interference-free contour.

KYCS(FM)	236C	Rock Springs, WY
KMGR(FM)	240C0	Randolph, UT
KCUA(FM)	223C1	Diamondville, WY
KBLQ(FM)	225C1	Logan, UT
KKEX(FM)	244C1	Preston, UT
KVFX(FM)	233C	Logan, UT

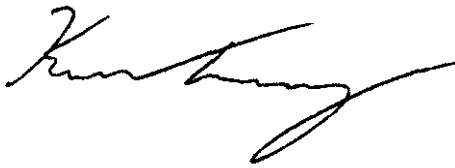
As shown in Exhibit I, no area will be deprived of service as a result of adopting the Joint Parties' Counterproposal. On the map, the area shaded gray indicates locations that already exist and will continue to be covered by one potential aural reception service. All other areas will retain at least 2 aural reception services (potential and/or existing). In effect, no white *or* gray area will be either created or eliminated when Channel 239C1 is reallocated from Marbleton to Ballard or when channel 257C1 is allotted to Marbleton. The current "potential service area" of KFMR(FM) 239C1 Marbleton, Wyoming, shall be completely covered by the "potential service area" of the proposed vacant allotment on Channel 257C1 at Marbleton. Therefore, contrary to Citicasters' assertions, no unserved or underserved areas will be created as a result of adopting the Joint Parties' Counterproposal.

Conclusion:

The Joint Parties' Counterproposal, when taken together, will establish first local services in the communities of Wilson, Wyoming, and Ballard, Utah (with a combined population of 1,860) under Priority 3 of the Commission's allotment priorities, and result in a net gain in radio service to 233,238 persons under Priority 4. In so doing, no white or gray area will be created under Priorities 1 or 2. In fact, as can be seen in Exhibit 2, when Channel 239C3 is reallocated to Ballard, Utah, for KFMR(FM)'s use, gray area will be eliminated to 399 persons. Additionally, Exhibit 3 illustrates that when Channel

223C 1 is reallocated from Naples, UT, to Diamondville, WY, and when Channel 240C0 is reallocated from Delta, UT, to Randolph, UT, gray area will be eliminated to another 648 persons. Together, these three reallocations represent the elimination of gray area to a net 1,047 persons under Priority 2. Consequently, the Joint Parties' Counterproposal furthers the Commission's allotment priorities.

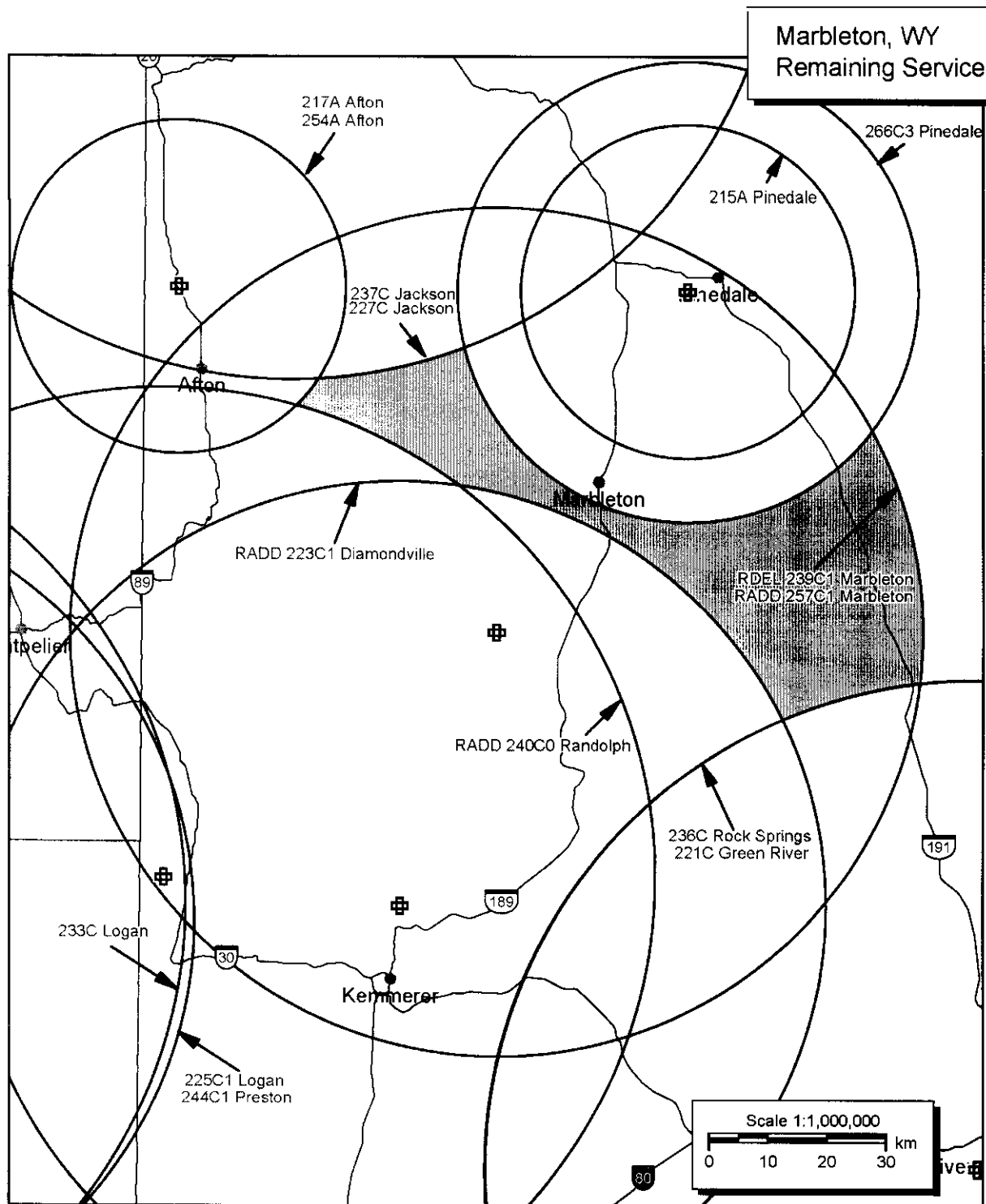
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin Terry", with a long, sweeping horizontal stroke extending to the right.

Kevin Terry, Engineer
Millcreek Broadcasting, LLC
3 Point Media – Coalville, LLC
3 Point Media – Delta, LLC
College Creek Media, LLC

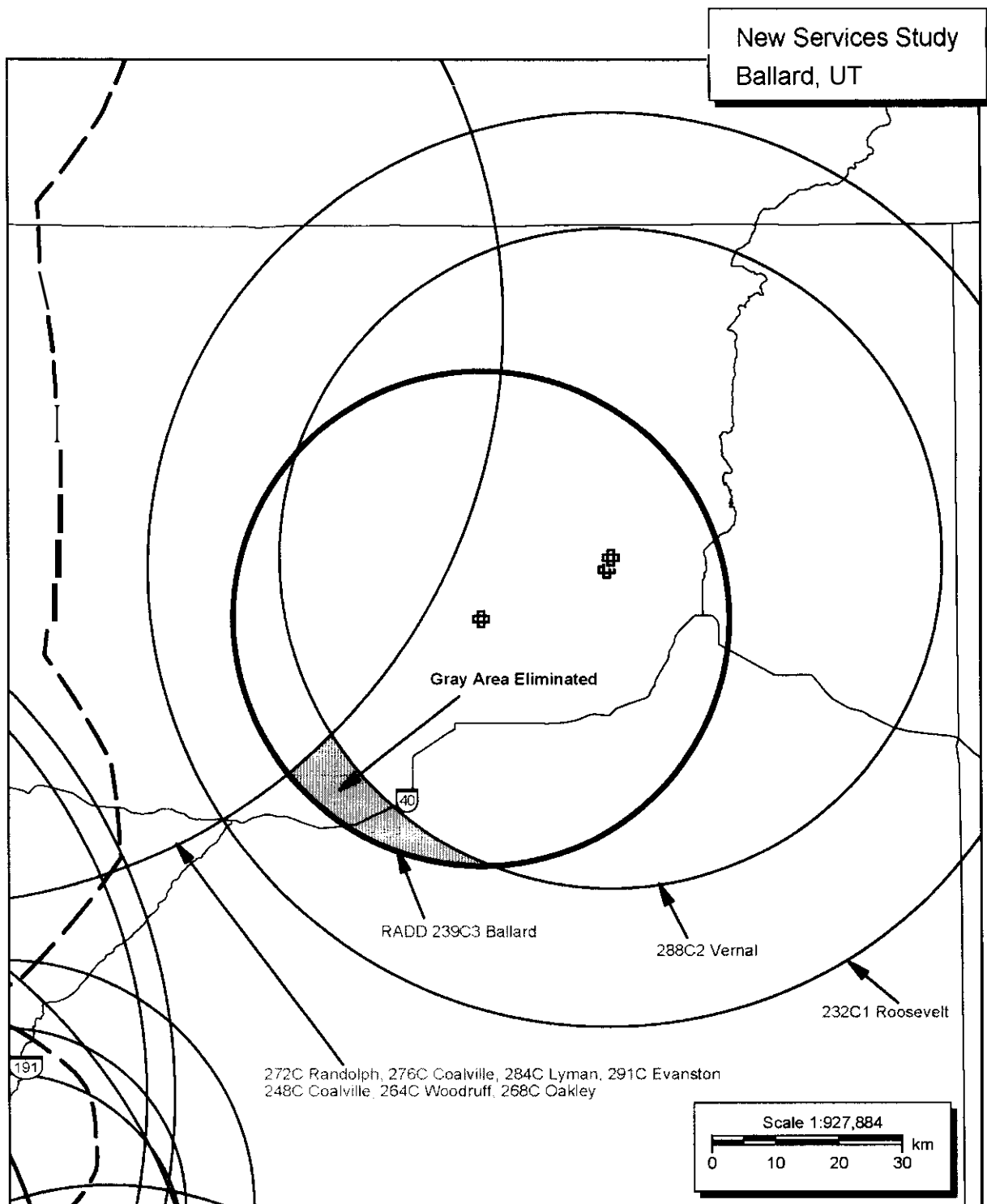
May 21, 2007
2835 E 3300 S
Salt Lake City, UT 84109

Exhibit 1



Persons Losing Sole Potential Reception Service:	0
Persons Retaining One Potential Reception Service	135 (shaded gray on map)
Persons Retaining Two or More Potential Reception Services:	14,356

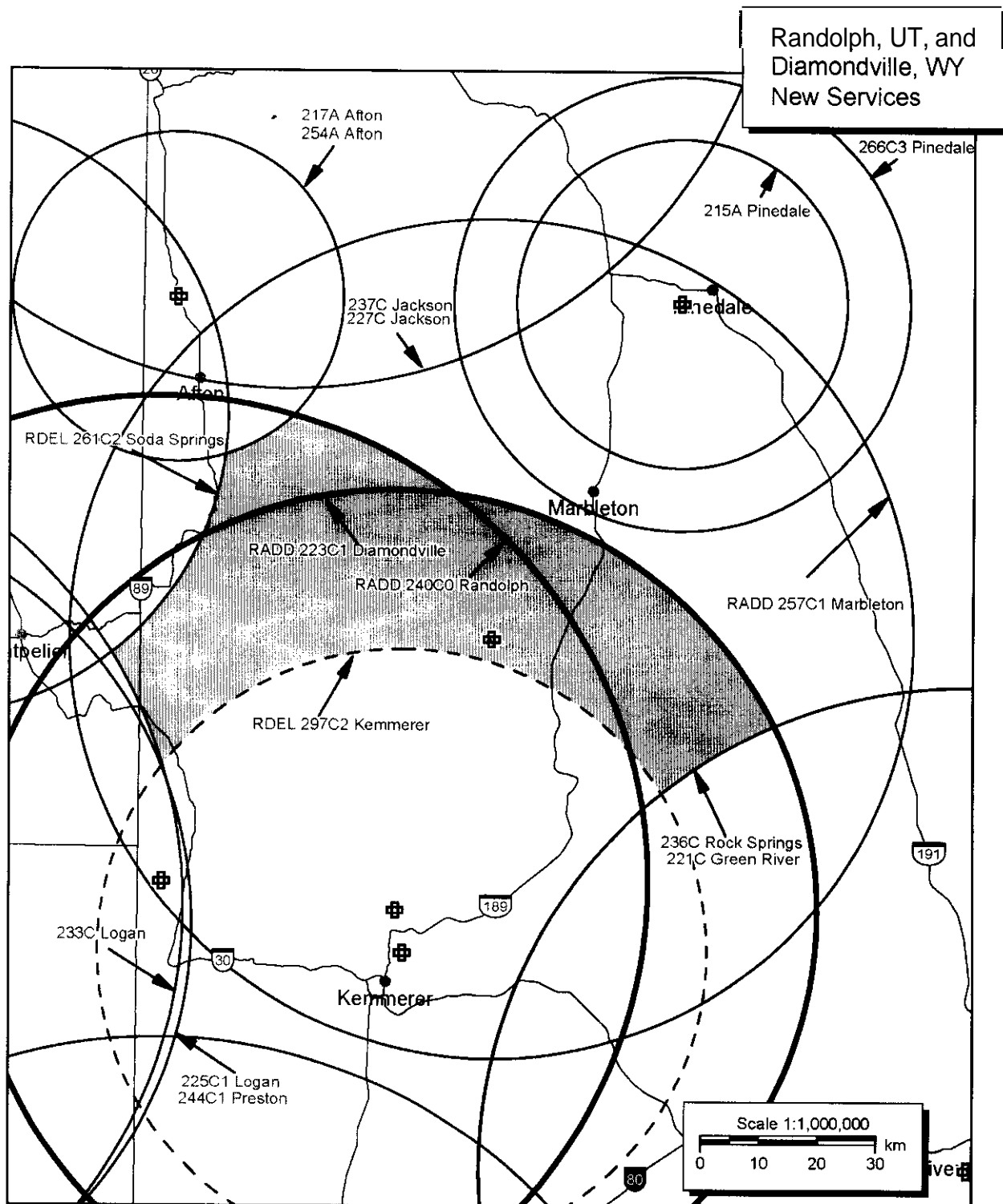
Exhibit 2



Persons Receiving New 2nd **Aural** Reception Service:
Persons Receiving New Aural Reception Service

399
33,587

Exhibit 3



Persons Gaining 2nd Aural Reception Service

648 (shaded gray on map)

CERTIFICATE OF SERVICE

I, Elbert Ortiz, in the law firm of Wiley Rein LLP, do hereby certify that I have on this 21st day of May, 2007, unless otherwise noted, caused to be mailed by first class mail, postage prepaid, copies of the foregoing **“Reply To ‘Request For Exercise of Commission’s Staff Discretion In MB Docket No. 05-243’”** to the following:

*Rolanda F. Smith
Federal Communications Commission
445 12th Street, SW
Room 2-B422
Washington, DC 20554

Citadel Broadcasting Company
City Center West, Suite 400
7201 West Lake Mead Blvd.
Las Vegas, NV 89128

Marissa Repp
Hogan & Hartson LLP
555 13th Street, NW
Suite 1300
Washington, DC 20004
(*Counsel to Citicasters Licenses, L.P.*)

Christopher D. Ornelas
Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037
(*Counsel to Brigham Young University
Idaho*)

Rocky Mountain Radio Network, Inc.
P.O. Box 190
Evanston, WY 82931

Evans Broadcasting, Inc
Rt. 2, P.O. Box 2384
Roosevelt, UT 84066

Ashley Communications, Inc.
575 West Main Street
Vernal, UT 84078

Sand Hill Media Corp.
P.O. Box 570
Logan, Utah 84321

* HAND DELIVERED

Elbert Ortiz